

BOARD OF APPEALS CASE NO. 5106

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BEFORE THE

APPLICANTS: Country Club Investors LLC

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ZONING HEARING EXAMINER

REQUEST: Special Exception to operate a country club, swim club with tennis courts, clubhouse and snack shack in the Rural Residential District; 2226 Rock Spring Road, Forest Hill

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OF HARFORD COUNTY

HEARING DATE: 8/6/01, 8/13/01, 9/19/01, 10/17/01, 10/24/01 & 1/16/02

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**Hearing Advertised
Aegis: 5/30, 6/6/, 6/13 & 6/20/01
Record: 6/1, 6/8, 6/15 & 6/22/01**

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Country Club Investors, LLC, is requesting a Special Exception, pursuant to Section 267-53A(2) of the Harford County Code, to operate a country club, swim and tennis club, including accessory snack shack and maintenance building in an RR/Rural Residential District.

The subject parcel is located at 2226 Rock Spring Road at the intersection of Rock Spring Road (MD Route 24) and the East-West Highway (MD Route 23), and is more particularly identified on Tax Map 33 & 40, Grid 4D, Parcel 429. The parcel consists of 22.98 acres, more or less, is zoned RR/Rural Residential District and is entirely within the Third Election District.

Mr. Jeffrey Deegan appeared and qualified as an expert engineer. Mr. Deegan, referring to the site plan introduced as Applicant's Exhibit No. 6, described the surrounding uses and the proposed uses of the parcel, the 23 acres backs up to a residential area and abuts MD Route 23 and MD Route 24. There are commercial uses to the south and east including a Pizza Hut restaurant, Klein's Supermarket, a bank and a church. Exhibit No. 6 shows a proposed use that includes 2 waterslides, one round and one more or less vertical in alignment that will sit on top of a proposed undulating berm paralleling Route 23 and that will vary in height from 10 to 20 feet. One waterslide will be 78 feet and the other will be 229 feet in length. The slides will be about 30 feet in height. There will be three (3) outdoor pools, a two story building to house another indoor pool and a third waterslide.

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The witness stated that trees, 6-8 feet in height will be planted on the berms. Exhibit No. 6 also shows a planned building that will house a 50 meter indoor pool. There is decking, parking for 229 cars and a storm water management area on the Exhibit all proposed to be constructed by the Applicant. The indoor pool is to be 7,380 square feet of surface area and the building where it is located is 16,000 square feet. The witness stated that professional services will be rendered on site which may include doctors, physical therapists, chiropractors and the like. The witness also stated that no lighting plan had yet been developed so he could not discuss lighting. The witness admitted that berms and planting will not screen from view the proposed activities from the residences located to the north. This was due to the topography which rises in elevation substantially moving from Route 24 parallel to Route 23. The effect is that the residences located to the rear of the subject parcel overlook the subject site and all of the proposed activities. Deegan admitted that the subject parcel is within an SSPRA area. Upon cross examination, the witness admitted that the use could not be screened and that even after the trees grow for many years, the residences will not be provided screening from the subject use. Additionally, the witness stated that the concrete pad will require excavation of 6 acres of land on the parcel. Deegan stated that sensitive features will be protected but admitted that no consideration had been given to protection of sensitive or protected species. Deegan also admitted that this proposed swim club will be substantially larger than any other swim club found in Harford County.

Next for the Applicant appeared Robert Wilson, a professional surveyor and one of the owners of Country Club Investors, LLC. Wilson described the complex as a state of the art modern swim club. In the building he anticipates a gift shop, rental shop, offices, locker rooms, showers and exercise room. Physical therapy services will be available to members and an exercise area will include weights and exercise machines. Wilson stated that 1500 family members are contemplated but admitted the complex was planned for 1800. Wilson also testified that average attendance would range from 25% to 40% of the membership. He was unclear as to how the proposed parking would accommodate overflow needs. The outdoor pools would be open from Memorial Day to Labor Day and the indoor pool and exercise area would be open year round.

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James Pacquette appeared on behalf of the Applicant and indicated he is also one of the principals of the Applicant LLC. The witness stated that he had visited each of the other swim clubs in Harford County. His visits were conducted in August, 2001. The witness described the parking uses at these clubs, the parking spaces and summarized his discussions with the on-site managers of those clubs. He admitted that parking is a problem at most clubs during swim meets but felt that the acreage of the proposed facility would allow ample overflow parking in such instances. He described the sound system as consisting of 60 outdoor directional speakers designed to look like low level rock formations. The witness then described the revised site plan, Applicant's Exhibit 6B, which withdraws the request for the building proposed to house the 50 meter indoor pool and provides additional screening. Interestingly, the additional screening is substantially accomplished by planting Leland Cypress trees on the adjoining residential properties. Ten (10) such trees will be provided by the Applicant to each residential property owner and guaranteed by the Applicant for one year. Pacquette also offered to limit membership to 1200 families, limit exercise equipment to free weights and 15 cardiovascular machines. Upon cross examination the witness indicated that this site was considered an ideal site because of its proximity to a road system, its visibility and the demographic support provided by the area of Forest Hill. The witness also described the architecture of the proposed use as Grand Floridian to resemble similar structures and facilities found in Florida.

Mr. Mark Eisner appeared and qualified as an expert hydrologist with expertise in hydrogeology. The witness stated that the parcel is surrounded by ridges much higher in elevation than the subject parcel and the result is a 250 acre bowl effect with this parcel in the bottom of the bowl. In determining how much water this facility might use, the witness attempted to obtain data from other swim clubs. Data on water use was obtained from the Joppatowne Swim Club. Joppatowne used 191,000 gallons of water from the period June 26, 2000 to September 22, 2000. The outdoor pool surface area is 5,800 square feet at Joppatowne. Based on the outdoor pool area of the proposed facility (17,980 square feet) he used a 3:1 factor for anticipated water use. Based on this analysis he concluded that the proposed facility would use 16,000 to 16,050 gallons of water each day during the season.

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The witness did not compare memberships, however, applying four criteria (outdoor pool usage, irrigation for plants, individual water consumption and indoor pool usage) and allowing for septic reserve return of water, the net usage of water would be annualized at 6,000 gallons per day. The witness also described nearby well data obtained from Harford County records. The witness concluded that there was an adequate water supply at this location to provide adequate water for this proposed facility. He admitted to an error factor of up to 20% in his findings and further admitted that there is little, if any, available data on water usage of similar facilities. Upon cross examination, Eisner stated that a residence uses 300 gallons per day on average. It was unclear whether this was a net or gross usage figure. The witness was not aware of any chlorine management practices intended by the Applicant.

Mr. Ken Schmid appeared next and qualified as an expert traffic engineer. The witness described his traffic study, the methods employed and the basis for his conclusions. His study assumed a daily usage of the facility of 450 cars or 20% of the total membership. While the witness admitted that the facility will have an impact on traffic, as would any other use on that parcel, the impact would not cause the intersection of MD Routes 23 and 24 to fail. He anticipates that this intersection, currently at a Level of Service “C”, will drop to “D” as a result of future planned development, not just as a result of this facility.

Mr. Anthony McClune appeared as representative of the Harford County Department of Planning and Zoning. McClune stated that the proposed use meets the definition of “swim club” entitling it to special exception treatment. Size of the facility, according to McClune would not be a factor that would dissuade him or the Department from that opinion. The witness stated that this particular location is actually less residential in nature than other RR areas in Harford County. There is already significant commercial use being made of adjacent and/or nearby properties. McClune stated that there would be no impact on Rock Spring Church because of distance, buffers, screening and MD Route 23. McClune also stated that “screening” as used in the Code, does not require completely blocking from view of other properties a particular use. Screening is only intended to interrupt complete view and, in the opinion of the witness the screening proposed by the Applicant meets or exceeds the requirements of the Code.

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McClune stated that the proposed use met the requirements for allowance of a special exception use as enunciated by the Maryland Appellate courts and further stated that in recommending approval of the proposed use, the Department took into consideration the “Limitations, Guides and Standards” set forth in Section 267-9I of the Code. Mr. McClune admitted that there is no definition in the Code for swim club or water park. There is, however, a definition of Commercial Amusement which includes many of the attributes of the current proposal including health clubs, nautilus clubs, tennis clubs and amusement. Mr. McClune made it clear that the Department’s position was that this proposed use is not a commercial amusement. He was unsure what classification would be given to the Bel Air Athletic Club and admitted that this was a commercial, for-profit venture by the developer.

First to testify for the Protestants was Christopher vanRoden, a member of the Fallston Swim Club for 11 to 12 years. The witness testified that the Club is owned by the members who operate the club through an elected Board. The Fallston Club has been operating at its present location on MD Route 152 for 31 years. The club has 720 family memberships and 1-15 individual memberships. There are 10 tennis only memberships. There is no gift shop but there is a snack shed. There are four pools. The primary pool is 4746 square feet, the back pool is 3,398 square feet, the baby pool is 360 square feet and the intermediate pool is 531 square feet. The total pool surface is 9,035 square feet. There are homes in close proximity to the pool but during the operating months, heavy foliage screens the pool from view of neighboring residences. The Fallston Club has 19.62 acres. Because of the location on Mountain Road there have been some serious traffic accidents at the entrance, primarily involving members turning left into the club from the northbound lanes being hit in the rear.

Next to testify was Scott Smith who qualified as an expert regional ecologist. Mr. Smith is presently employed by the Department of Natural Resources as a regional ecologist and is recognized as the State’s expert on bog turtles, a state and federal threatened species. Mr. Smith described a SSPRA, acronym for Sensitive Species Project Review Area. These are mapped polygons throughout the State that identify areas of habitat for rare, threatened or endangered species.

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Mr. Smith testified that he was not contacted by the Department of Planning and Zoning relative to this site but responded to a citizen inquiry regarding the status of the site. Smith stated that bog turtles were first found on this site on August 9, 1977. On May 4, 1991 the Chesapeake Audubon Society also identified a bog turtle on the site. During a 1993 assessment yet another bog turtle was identified on the subject parcel. During Spring, 2002, DNR will conduct a statewide assessment for this species. Smith said the bog turtle was first characterized as “threatened” in 1994 and at present, the status is declining to endangered. Even though the bog turtle is the smallest turtle in North America, Maryland boasts the highest density of this species anywhere in the world. Smith described federal efforts at protecting this species and discussed the 2001 federal recovery plan. That plan is designed to provide parameters for protection of the species and compliance by State governments is required. The recovery plan describes three zones of conservation. The first zone is the wetland areas including wet meadows or pastures and spring seeps. Development activities are prohibited in Zone I. Zone II includes a 300 foot buffer around Zone I. Activities to be avoided in Zone II include development, sewer lines, utility lines, storm water sedimentation basins, mining, herbicide application, pesticide or fertilizer applications, farming except light grazing certain types of stream bank stabilization techniques. Lastly Zone III includes upland, wetland and riparian areas extending either to the geomorphic edge of the drainage basin or at least 1/2 mile beyond the boundary of Zone II.

Smith testified further that the wetland areas where these turtles inhabit are not pond area but are spring fed wetlands. Ground water and surface run-off feed the wetland area of bog turtle habitat. Because of this storm water management ponds are prohibited in Zone I because they draw surface water away from the wetland area and pool that water which evaporates rather than feeds the wetland. Smith was quite concerned that water would be drawn from the ground for this project and stated that public water would be far more preferable than ground water usage for this project. Mr. Smith testified that the subject parcel is protected bog turtle habitat and, in his opinion, the site plan submitted by the Applicant (Exhibit No. 6A) would require substantial modification in order to be approved by his Department.

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Dr. Ira Kolman appeared next and qualified as an expert in the field of environmental noise pollution, sound analysis and sound impacts. He described the noise level standards set forth in the Code of Maryland (COMAR). The maximum allowable decibel level for residential property lines is 65 decibels during daylight hours and 55 decibels during nighttime hours (10:00 p.m. to 7:00 a.m.). In determining noise emanating from the proposed use, the witness used three models - one assuming 250 people on site, one assuming 500 people on site and lastly, one that assumed 1000 people using the facility. With 250 people, acceptable sound levels would not be achieved until the property line was 768 feet away; with 1000 people the property line would need to be 1,536 feet away to achieve allowable levels of sound. Kolman stated that the proposed tree plantings and berms will only minimally reduce the sound levels because the rule is that if a thing can be seen it can be heard. The facility will be visible from adjoining residential properties so it will be heard. Kolman visited Rock Spring Swim Club on a day when 40 people were in the pool. Those 40 generated 99 decibels at 10-15 feet. As more people are in an area, the level of noise increases and voices get louder. The phenomenon is called the Lombard Effect. This phenomenon indicates that noise is cumulative as opposed to additive. For example, 10 people talking in a room generate more noise together than the sound of each of the ten added together. He believes more noise will be generated on the waterslides as opposed to the pool given the roller coaster effect of the slides. In his expert opinion, the proposed facility will generate noise levels not permitted by COMAR.

Father Mark Gatza, Rector of the Christ Church in Rock Spring parish appeared next. The Church is located across from the subject parcel with Route 23 acting as the divider between the properties. The church was originally built in 1805 and has no air conditioning. The church is of ecclesiastical design. There are 320 active church members and other inactive members. The church is used nearly every day of the year and activities are varied including Girl Scouts, Boy Scouts, AA meetings, bible study classes, weddings and funerals. Directly adjacent and behind the church is the Forest Hill recreational complex which is home to local baseball, softball and soccer leagues and is heavily used.

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Father Gatza has concerns about the noise that will intrude upon the activities of the church and feels that noise from the amusements provided at the subject facility will be inappropriate for most if not all of the church activities. He is also concerned about the water usage. On the church property continues to exist the outflow of the Rock Spring for which the church, the parish and the area is named. The water is potable and people still come to the spring to drink the water. He recalled water issues during the construction of the North Forest development. Because of vibrations caused by grading operations the septic system had to be replaced. He is aware that commercial development exists to the other side of Route 24 and he likes the fact that all of the present commercial activity is placed across Route 24. He thinks the proposed use is incompatible with the church and surrounding residential uses.

Mr. David Moyer appeared next. Moyer owns adjoining property that sits well above the subject property and actually overlooks the proposed facility. His property line is about 600 feet from the center of the proposed project. He indicated that the developer had approached him and offered to plant trees on his property on the hill, that they claimed would obscure his view of the facility. The witness indicated that he does not want his property bifurcated by a row of trees. In order to obscure his view these trees would cut his property in half. Even if these trees were planted, they would need to be 30 feet in height before full screening of the facility occurred. He is concerned about his well and water usage proposed by the developers. His well was anticipated to be 5 gallons per minute. After digging his well 450 feet deep at a cost of \$3,800.00 his well only yields 4.5 gallons per minute. He produced photos of local area ponds which indicate severe loss of water.

Moyer also described the area traffic and opined that this facility will heavily contribute to what is already becoming an area of high traffic congestion and use. Moyer is also concerned about the size and scope of the project. In his opinion this is a commercial venture unlike the other area pools that are generally owned by the members and operate as non-profit clubs. The scope of the project is huge and he does not believe this is what Harford County intended when they allowed swim clubs as special exceptions in a rural residential area. Moyer also thought the size and scope of the project would inevitably lead to further commercialization of that side of Route 24.

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Mr. Keith Watson appeared next. Watson is also an adjoining property owner and lives next door to Mr. Moyer. According to Watson, he will be able to see this facility despite the berms and trees proposed by the Applicant. Like the Moyer property, his property overlooks the site of the proposed facility and he is certain after hour lighting will be bothersome as well as all day noise. He is very concerned about traffic congestion, particularly during those times when athletic fields are heavily used.

Linda Baker appeared next and indicated she owns what was the original farmhouse of the Warfield farm. Her well is 376 feet deep and her yield is only 2 gallons per minute. She is concerned about toilet flushes and other water uses that cause her to be without water. She cannot water her lawn. The water situation has gotten progressively worse as homes have been built in the immediate area. On Labor Day there was no water. After waiting three hours for recharge, only a kitchen sink could be used to wash her daughter's hair. In addition to her concerns about the water use proposed by the Applicant the witness expressed concerns about the potential impacts of noise from the facility.

Next to testify was Richard Fingsten who qualified as an expert in the field of wetland science and water quality assessment. During construction of the Bel Air Bypass and Hickory Bypass, Fingsten visited the site. This was in 1977 and was part of an overall assessment for the State Highway Administration (SHA). The area is described as a high quality wetland. There is little trash in the wetland and water is supplied by the groundwater from the Smith property. The site, according to the witness looks like prime bog turtle habitat. He advised SHA in 1977 that the site would not be suitable for wetland mitigation because it was a prime bog turtle habitat and it was not large enough. On the site there are found hummocks (clusters of grass) that are characteristic of bog turtle habitat. In the opinion of the witness, these wetlands are unique and he expressed concern that the Applicant's proposal included large areas of impervious surface. Run off will be directed to a proposed storm water management pond. Surface waters would be diverted away from the wetland into the pond and ultimately evaporate without recharging the wetland area contributing to the destruction of those wetlands.

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In referring to the site plan the witness noted that there was no mitigation relative to the Zone II buffer requirement of the federal recovery plan. Compliance with the Zone II buffer would eliminate two tennis courts, the adult pool, the elevated deck with pavilion, part of the children's pool, part of the diving pool, lap pool and part of the flume.

Jacquelyn Magness Seneschal was admitted as an expert in land use planning and zoning. The witness stated that she was one of the drafters of the 1982 zoning code. In 1982 the entire Code was rewritten. The subject property is outside of the development envelope and there is no water or sewer service planned for the parcel. The rural plan designates the parcel as rural in-fill for the Forest Hill Village Center. The site has extensive areas of wetland and is within a sensitive species protection area. Ms. Seneschal described her experience with the application of state and federal guidelines for buffer areas related to sensitive species particularly as they relate to a development in Charles County known as Chapman's Landing. There was identified a bald eagle habitat that required the developer to comply with buffer areas and leave undisturbed areas of buffer that would protect the bald eagle. In determining whether a particular special exception use is compatible with the neighborhood, the witness stated it was important to define that neighborhood. In this case, the witness defines the neighborhood as including the southern half of the Village of Forest Hill. This area is a transition area between the commercial areas of Bel Air and the rural areas of the County toward Rocks State Park and beyond.

The witness expressed concerns that some of the proposed uses would not be compatible with other existing uses in the RR District and were not consistent with the commonly accepted description of a swim and tennis club as those uses exist in Harford County. The weight room, water slides, exercise equipment, gift shop, rental concession and medical services were not normally associated with a swim or tennis club and were more like the commercial amusements and recreation defined in the Code.

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There are other areas of the building that do not yet have described uses so it is difficult to assess just what those uses might be. She compared the proposed use to the commercial use being made of the Klein's Supermarket directly across Route 24. The developed areas of the site are about the same size. Klein's has 262, 000 square feet of impervious surface and this facility has 244,000 square feet. Klein's has 329 parking spaces and this facility proposes 280. She described the use as intense and stated it was much like a commercial use.

The witness pointed out that a lighting plan had not been submitted and, in her opinion, approval cannot be granted by the Hearing Examiner until the lighting plan is submitted and impacts associated therewith can be assessed. Screening is not being provided in accordance with the Code. After completion of plantings and berm installation, most, if not all of the pool area, parking area and buildings will be visible from residential properties. Ms. Seneschal stated that several facilities were considered when the provisions of Section 267-53(A)(2) of the Code were drafted. The types of facilities considered to be compatible with the other uses found in the RR District were the Fallston Swim Club, Maryland Golf and Country Club and Fountain Green Swim Club. There are no provisions for pedestrian access to the site and it appears that the project will distinguish itself as not connected to the Village of Forest Hill. This is incompatible with the intent of a rural in-fill and Village district. Additionally the Grand Floridian architecture is completely out of place in the Forest Hill Village Center. This will be the single largest facility in the Village Center yet it will have no connection to that Village Center and actually is designed to be different from and set apart from the Village Center. The Christ Episcopal Church has historical significance being the first Maryland church established under the 1798 Vestry Act. She believes the view from the windows of that historic church should remain as undisturbed as possible and a view of water slides will not be one that satisfies that concern. She expressed concerns about water depletion, destruction of sensitive habitats and increases in traffic.

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Ms. Seneschal stated that the site plan had serious deficiencies. Because the special exception approval is tied so closely to the final site plan, the witness did not believe approval could be forthcoming based on lack of vital information and the possibility that the proposed site plan will change significantly as part of the development and agency review process. There has been no updated traffic study submitted. There is no lighting plan. There is not noise abatement plan. There is before the Hearing Examiner a site plan that makes no provision for Zone II buffering. The Applicant has presented a plan that cannot provide the screening required for approval of such a special exception use.

Jami Melaney appeared and testified that he lives north of the site. His property, like the Moyer property, overlooks the area where the proposed facility will be located. He does not believe the site can be adequately screened from view of his property. He expressed concerns about increased traffic. He has children that have competed in swim meets throughout Harford County and he is familiar with traffic generation resulting from a swim meet. Traffic along Route 24 is already very heavy according to the witness and parking for swim meets will be problematic in his opinion.

Lewis Long appeared and testified that he was once the manager of the Fallston Swim Club. He testified that there are three ways water is lost from a pool operation. The first is people entering and leaving the water. The second is losses due to evaporation. Thirdly is back-flushing the filters. This involves reversing the flow of water through the pump to clear the filters and this water is sent to the drain field. The witness testified that the amount of water lost to back flushing would vary but at Fallston the average loss was 200 gallons per day. Including other losses the total water used at the Fallston Club during his tenure ranged from 2,000 to 4,000 gallons per day and on very busy days, up to 8,000 gallons in a day. Fallston Club had three wells to service its needs. Because of the amount of water usage there were times a well would run dry and it would be shut down for several days to allow recharge. The practice was to alternate wells to avoid draining them down. Because of the bog turtle habitat present on the site, the witness expressed concern that there was little information being offered by the Applicant as to the impact of this effluent on the bog turtle habitat, the wetlands and area well water.

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Next to testify was Emily Powers who lives next to the Moyer property. Like the Moyer property, her property overlooks the subject site and is at least 45 feet above the level of the proposed pools. She does not believe any screening can be provided that will block her view of the pool and other uses on the site. The witness expressed concerns very similar to those of her neighbors regarding noise, lighting and traffic.

Deborah Comstock appeared and stated that she lives about 1/2 mile away from the site. The witness stated that this area has a reputation of being difficult for water needs. Because of future additional development in the area proposed but not yet built, she has significant concern that the proposed water consumption of this facility will create problems for neighborhood wells. In her opinion, this use is incompatible with the rural nature of the area. This facility and its attendant impacts will, in her opinion, diminish the value of her property.

Michael Worsham appeared and explained that he is an attorney and a resident of the vicinity and that he was representing himself in this case. He described the increase in traffic since he moved to the area 8 years ago. When he moved in making a right on red at Route 23 and 24 intersection was no problem but now, there is simply too much traffic to allow safe right turning on red. He is concerned that traffic will be further increased as a result of this project. He was also surprised to learn that bog turtle habitat existed on the parcel and wants that habitat protected. Based on what he has seen and heard only harm can come to the bog turtle and its habitat as a result of this proposed use. Lastly, Mr. Worsham put into evidence documentation the Route 24 is recognized as Maryland Scenic Byway. There are only two Maryland Scenic Byways in Harford County.

Clarence Suggs, Joanne Mueller, Tony Battista all appeared and testified that live in close proximity to the subject site. They expressed concerns similar to those of previous witnesses regarding traffic and water impacts. Mr. Battista testified that his well has gone dry in the past and he is aware of several other wells in the area that have dried up. This occurred without a commercial user of water like the proposed facility and he is very concerned that this facility will contribute to further area well failures.

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Michael Hollins appeared in rebuttal and qualified as an expert in wildlife vegetation ecology and bog turtle habitat. The witness stated that this parcel contains bog turtle habitat. The witness stated that the location of the storm water management facility as shown on the Plat (Exhibit No. 6A) would not be a problem as to the turtle habitat. Impervious surfaces will create pollutants in run off that will make its way to the wetlands and storm water management facility. Erosion will be controlled by the storm water management facility. Although initially admitted as an expert in bog turtle habitat, the witness stated that he was not a bog turtle expert.

The witness stated that only about one-third of the wetlands shown on the site plan were true wetlands. In his opinion woody plants are encroaching into the wetland and this is not good for bog turtle populations. He described bog turtles as living in fens, areas of wetlands fed by groundwater. These wetlands remain wet all year and ground water recharge is, in his opinion, critical to the bog turtle survival. He opined that only 25% of the bog turtle habitat was reproductive habitat although he admitted this was a rough estimate made without the benefit of a survey. The witness stated that in his opinion, the development as proposed would have no adverse impacts on bog turtle habitat. Woody vegetation can be controlled by herbicide applications. Further, the witness thought that local conservation groups and a conservation easement could provide the stewardship necessary for protection of this habitat.

Mr. Anthony McClune was briefly recalled and testified that it is normal practice for site plans to undergo review and alteration during the development process. Only if the changes are determined to be substantial is further review by the Board of Appeals sought.

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CONCLUSION:

The Applicant, Country Club Investors, LLC, is requesting a Special Exception, pursuant to Section 267-53A(2) of the Harford County Code, to operate a Country Club, Swim and Tennis Club including accessory snack shack and maintenance building in an RR/Rural Residential District.

Harford County Code Section 267-53A(2) provides:

A. Amusements.

- (2) Country clubs, golf clubs, tennis and swim clubs. These uses may be granted in the AG, R, RR, R1, R2, R3, R4 and GI Districts, provided that:**
- (a) No off-street parking or loading area shall be located within any required yard or within twenty-five (25) feet of any parcel boundary.**
 - (b) Off-street parking and loading areas, swimming pools, and tennis courts shall be screened from adjacent residential lots.**
 - (c) The principal access road shall be provided from an arterial or collector road.**
 - (d) No more than 20% of the land area upon which such a use is conducted may be located in the GI District.**
 - (e) Any outside lighting used to illuminate a use permitted under this section shall be designed, installed and maintained in a manner not to cause a glare or reflection on adjacent residential lots.**

Section 267-52 of the Harford County Code provides as follows:

- A. Special exceptions require the approval of the Board in accordance with Section 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.**
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.**
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.**

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- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.**
- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.**

Section 267-9I provides:

“Limitations, guides and standards. In addition to the specific standards, guidelines and criteria described in this Part 1 and other relevant considerations, the Board shall be guided by the following general considerations. Notwithstanding any of the provisions of this Part 1, the Board shall not approve an application if it finds that the proposed building, addition, extension of building or use, use or change of use would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood. The Board may impose conditions or limitations on any approval, including the posting of performance guaranties, with regard to any of the following:

- (1) The number of persons living or working in the immediate area.**
- (2) Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to roads; peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.**
- (3) The orderly growth of the neighborhood and community and the fiscal impact on the county.**
- (4) The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.**
- (5) Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the county or persons to supply such services.**
- (6) The degree to which the development is consistent with generally accepted engineering and planning principles and practices.**
- (7) The structures in the vicinity, such as schools, houses of worship, theaters, hospitals and similar places of public use.**

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- (8) The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.**
- (9) The environmental impact, the effect on sensitive natural features and opportunities for recreation and open space.**
- (10) The preservation of cultural and historic landmarks.”**

In the opinion of the Hearing Examiner, the threshold question is whether the proposed use constitutes a “country club, golf club or swim club” and is this entitled to consideration of special exception use at all. In examining the elements of the proposed use the Hearing Examiner finds that there is a swim club aspect of this use in that there are several indoor and outdoor pools proposed on this parcel. There is no definition of swim club or country club found in the Harford County Code. In determining whether this is a swim or country club the Hearing Examiner gives great weight to the testimony of Mrs. Jacqueline Seneschal, who was one of the drafters of the special exception language at issue in this case. According to Mrs. Seneschal the statutory meaning of swim and country club was intended to apply to facilities such as the Fallston Club, Fountain Green and/or, in the case of country club to the Maryland Golf and Country Club. This facility is significantly more intense and includes uses not contemplated by the drafters as swim or country clubs. These include gift shop, rental shop, exercise rooms with exercise equipment and free weights and large water slides. The amount of pool area of the proposed facility is more than twice as large as the largest existing swim club – Fallston Club. This facility will have 20,379 square feet of pool surface and 1200 family memberships while Fallston Club has 9,035 square feet of pool surface and 750 family memberships. There is no doubt that the mere size of this facility goes beyond the commonly accepted definition of swim club, but the size coupled with the other uses proposed at this facility lead to the inescapable conclusion that this is a “commercial amusement” as that term is defined in the Code.

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Harford County Code Section 267-4 states:

“COMMERCIAL AMUSEMENT AND RECREATION -- Establishments providing commercial amusement, entertainment or recreation, including arcades, bowling alleys, gymnasiums, health clubs, martial arts clubs and schools, miniature golf courses, nautilus clubs, pool halls, skating rinks, tennis and racquetball clubs.”

This proposed use includes tennis courts, exercise equipment (similar to nautilus equipment), gymnasium-like year round work-out facilities, professional services of medical professionals. The waterslides described by the Applicant can be characterized as a commercial amusement and indeed, such waterslides are often found as stand-alone facilities in a number of resort areas. Such facilities can hardly be characterized as a swim club. The Applicant would have us believe that uses properly characterized as commercial amusement and recreation pursuant to the Harford County Code are somehow transformed into a swim club by adding one or more swimming pools to the facility.

This proposed use is a huge amusement park providing year-round recreation and entertainment for a large number of persons. It is a commercial, for-profit enterprise and is not a country or swim club as contemplated by Code Section 267-53(A)(2). It is more accurately described as commercial amusement and recreation and is not entitled to special exception use in an RR zone pursuant to the Harford County Code.

Even assuming, arguendo, that this use could be stretched beyond imagining to fit within a very broad definition of swim or country club, and the Hearing Examiner believes it cannot, this use would still not be entitled to approval of its request due to a number of factors. First, in considering the grant of a special exception use in Harford County, the Guides, Limitation and Standards of Section 267-9I must be considered.

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In considering those provisions, the record is fairly extensive that:

1. Traffic will be increased in an area already subjected to times of high traffic usage. A facility such as this, with 1200 family memberships could create significant additional automobile travel, particularly during summer months. However, this facility is intended to be open year round so at least some increase in traffic will result from this facility. Clearly, a commercial activity like the one contemplated will create more automobile trips to and from than would other uses permitted as of right in the RR zone. There are no provisions for pedestrian ingress or egress so all travel to and from the site is expected to be by auto.
2. There will be generated noise that will potentially exceed levels allowed under State law. In any event the noise associated with the use of pools and waterslides will be loud and offensive to nearby residential uses. An after hours lighting plan was not produced by the Applicant however, the Hearing Examiner can conclude that there will be after hours use and lighting will be seen by neighboring properties.
3. This development is not consistent with other uses in the neighborhood. Mrs. Seneschal accurately described this parcel and neighborhood as a transition area and described the Village Center of Forest Hill. The proposed facility is intended to have little or no connection to the Village Center lacking pedestrian accommodation and involving architecture (Grand Floridian) that is completely out of character for this neighborhood.
4. Similarly, located across Route 23 is the Christ Episcopal Church, erected in 1805 and of significant historical value to the community. This modern commercial amusement park shares absolutely nothing in common with the church or the activities conducted there and the noise, traffic and appearance of this amusement park can only serve to have significant adverse impacts on the Church and its parishioners.

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5. There was significant testimony regarding the water problems commonly known within this neighborhood. The amount of water usage contemplated by the facility is nothing short of astounding. With less than 50% utilization of the facility's membership, net water consumption is anticipated to be 6000 gallons per day annualized, however, during the hot summer months, months wherein Harford County suffers the most during periods of drought, this usage rises to 16,000 gallons or more per day. Obviously, increased usage beyond estimates used will result in even greater water usage by this facility during peak use periods.
6. There was significant testimony regarding the environmental features of the property. This parcel contains areas of bog turtle habitat. Bog turtles have been identified as a threatened species and may be close to reaching endangered status. Many of the aspects of the site plan lead to the inescapable conclusion that the bog turtle habitat, and thus, the bog turtle itself, is left unprotected by the Applicant's proposal. The increase in impervious surface area and associated pollutants combined with inadequate buffering will have an adverse impact to the habitat and turtle population. The proposal does not meet federal guidelines for bog turtle habitat protection. Chlorine containment has not been addressed by the Applicant. Herbicide and pesticide applications are proposed, particularly to contain woody growth, and such applications have been determined to be harmful to bog turtles and their habitat.
7. Maryland Route 24 is a Maryland Scenic By-way, one of only two in Harford County. In the opinion of the Hearing Examiner, a waterslide and amusement area has no place along a Scenic by-way and constitutes at the least, an eyesore and contributes to additional traffic unnecessary and unwanted at this location.

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Turning to the specific requirements of Section 267-53A(2), the record is replete with testimony that the Applicant cannot meet the specific statutory requirements of the Harford County Code. Specifically required is that swimming pools and tennis courts, as well as parking and loading areas shall be screened from adjacent residential lots. This area is a bowl-like area with residential uses located on the top of the bowl and the proposed facility located at the bottom. The Applicant has proposed berms and plantings but admittedly and unrefuted, none of the efforts of the Applicant can screen this facility and its various uses from the view of residential lots. These neighbors will not be screened in any meaningful way and it is doubtful whether any screening will be effectuated at all by the Applicant's proposed berming and planting. A number of engineers testified that complete screening could not be accomplished but what is clear is that no real screening can be accomplished because of the topography of this area.

Both the Department of Planning and Zoning and the Applicant would have us buy into a concept that contradicts the plain language of the statute, namely that only partial screening that partially interrupts the view is required for compliance with the screening requirements of 267-53(A)(2). With due respect to both the Applicant and the Department, the statute makes no such provision and requires that parking and loading areas, swimming pools and tennis courts "shall be screened from adjacent residential lots." According to Webster's New World Dictionary, Second Edition, the act of screening is the act of concealment from view, like a curtain. Neither the statute nor the common meaning of the term allows for partial concealment or screening.

The standard to be applied in reviewing a request for special exception use was set forth by the Maryland Court of Appeals in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) wherein the Court said:

"...The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any facts or circumstances negating the presumption*. The duties given the Board are to judge whether the *neighboring properties in the general neighborhood would be adversely affected* and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

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Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. (Citations omitted). These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.” (Emphasis in original).

The Court went on to establish the following guidelines with respect to the nature and degree of adverse effect which would justify denial of the special exception:

“Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” 291 Md. At 15, 432 A.2d at 1327.

Applying the facts of this case to the guidance provided by the Schultz court, the Hearing Examiner finds that this use at this location will have significant impacts above and beyond those of a “swim club” regardless of its location within the RR zone. As already discussed, these impacts include, but are not limited to noise, lights, glare, traffic, water usage, environmental impacts particularly to recognized bog turtle habitat, and a failure of the Applicant to provide the screening from adjacent residences required by the statute.

Finally, Protestants argue that the site plan submitted by the Applicant and modified during the hearing will undergo substantial further modification as a result of the review processes leading to final approval. Anthony McClune testified that it is common practice for plans to undergo modification during the review process and only substantial modifications to the site plan need go back to the Board for further approval.

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While the Hearing Examiner agrees generally that this is the statutory mandate of Section 267-52 of the Code, it is less than clear that this Applicant has submitted what is proposed to be the final site plan for approval by the Board. It is particularly important in special exception cases that the final contemplated site plan be submitted so that impacts may be thoroughly evaluated.

Based on the testimony of the Applicants and the Department of Planning and Zoning the Hearing Examiner is forced to conclude that certain elements of the site plan are to be developed at some later date. These include provisions for bog turtle habitat buffering, location and size of storm water management facilities, type of filtration and back wash requirements. Each of these elements could have significant further impacts and must be submitted as part of the Applicant's case otherwise, the Board is forced to decide the impacts of a facility that could be quite different than that actually constructed.

For all of the above reasons the Hearing Examiner recommends that this request be denied.

Date: APRIL 23, 2002

William F. Casey
Zoning Hearing Examiner